

No. 22447

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, Trustee of the Estates of Wm. H. MECOM
and ZETTYE M. MECOM,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE,

Appellee.

REPLY BRIEF FOR APPELLANT.

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Whether the Referee, in the Exercise of His Equitable Jurisdiction, Had the Power to Permit the Filing of the Government's Amended Claims Is Not a Question Presented by This Appeal.

Appellant believes that his opening brief adequately states his position on each of the errors relied on. This reply brief is limited to the points raised in the Government's brief wherein authorities are cited for the proposition that the Referee could have permitted the filing of the amended claims for equitable reasons [Br. 20-24]. Appellant submits that this question is not before the Court nor has it been considered by the Referee or the District Court. The Referee's Certificate on Review recites that "The basic question presented is whether the case of *Menick v. Hoffman*, *supra*, is controlling in the situation here presented." [R. 75].

Conclusion of Law I shows that the Referee based his decision solely on the authority of *Menick v. Hoffman*, 205 F. 2d 365 (9th Cir., 1953), and on no other ground [R. 67-68]. The basis for the Referee's decision can be found in the following words:

"I don't think that the ruling in the *Menick* case should extend to these circumstances, but I do feel bound by it, and that if the Circuit is going to determine that it does not so understand, the Circuit is going to have to be the one to reverse their ruling.

"So I am going to follow the *Menick* case and hold that since these came from the same generic origin, to-wit, taxes, that the amended claim should be filed; but I will also find, if you wish such a finding, that the Trustee had no notice of the pendency of this claim under the usual rules laid down, writings or assertions. You are familiar with those guidelines." [Tr. pp. 89-90].

There is nothing in the record of these proceedings on which the Government can base an argument for the application of the equitable principles asserted in its brief. To the contrary, the record is clear that Referee Walker was limiting the basis for his decision to the authority of *Menick v. Hoffman*, *supra*, believing that the decision in that case controlled the decision in this case.

In its argument before the Referee, its points and authorities filed with the District Court, and its brief before this Court, the Government continues to assert the doctrine of equitable jurisdiction as an alternative ground for sustaining the Referee's decision, citing *Bank of Marin v. England*, 385 U.S. 99, 87 S. Ct. 274,

17 L. Ed. 2d 197, and *Pepper v. Litton*, 308 U.S. 295. The great majority of courts have held that the bankruptcy court is without power to extend the time limit for filing claims upon equitable grounds short of outright fraud. 3 Collier, *Bankruptcy*, Section 57.27. There is nothing in the record from which the Referee could have found that the Government failed to file its amended claims within the six month period because of fraud by the trustee. To the contrary, the Referee specifically found that the trustee had no notice of the Government's additional claims until the amended claim was filed on December 22, 1966 [R. 66, 67].

The Government's real contention is that it should be permitted to file an amended claim after the six month period whenever a trustee in bankruptcy recovers assets which make such a claim more valuable. Stated another way, the Government would ask that a creditor be permitted to file claims at any time after the trustee recovers assets which had not come into the estate during the six month period on the ground that it would be inequitable to deprive a creditor of his right to participate in the distribution of such assets when their existence was not known within the six month period. Such a contention would completely destroy the purpose of Section 57n of the Bankruptcy Act (11 U.S.C. §93n), and would make the orderly administration of a bankrupt's estate virtually impossible.

Finally, appellant would point out that the Government makes assumptions regarding the assets of the alter ego corporation which are not supported by any evidence whatsoever. The Government states that the alter ego judgment completely depleted the corporation's assets [Br. 21]. There is no evidence in the record to

support this statement. Likewise, there is nothing in the record to indicate that the Government would be precluded from collecting tax claims against H & M Distributing Co., Inc., notwithstanding the alter ego judgment. Therefore, these erroneous assumptions of fact should not form the basis for applying equitable principles.

Appellant submits that the application of equitable doctrines to the questions before this Court is beyond the scope of the appeal and should not be considered. It is for the trial court and not the appellate court to exercise equitable powers and in this case the Referee declined to base his ruling on such powers, consequently this Court should likewise decline to base its decision on grounds other than those relied upon by the Referee.

Respectfully submitted,

HILL, FARRER & BURRILL,

By JOHN J. WILSON,

Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. WILSON

